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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 507

CALIFORNIA DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT, *et al.*,

Appellants,

against

JUDITH JAVA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
of Counsel

... of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Interest of *Amicus*

At issue in this case is that provision of the California Unemployment Insurance Code which provides for suspending, when an employer requests a hearing, the payment of unemployment insurance benefits to claimants determined by the administrative agency to be eligible

for such benefits, the suspension continuing until the decision following the hearing. Calif. Unempl. Ins. Code, § 1335. The court below has held that the California statute violates both the federal Social Security Law (42 U.S.C. § 503[a][1]) and the due process clause of the Fourteenth Amendment.

The State of New York, which follows a procedure substantially similar to that of California (New York Labor Law § 598), administers, through its federally approved Unemployment Insurance Law (New York Labor Law §§ 500-635), probably the largest unemployment insurance program in the country. An affirmance of either the statutory or the constitutional holding of the decision below must have a major impact on the New York program. Especially in veiw of the wide scope of the constitutional aspect of the decision below, but even in view of any limiting of that decision to its statutory aspect and to the facts of the case, New York would have to alter the structure of its program in ways which would be detrimental to the sound administration of that program. Accordingly, the State of New York by its Attorney General, files this brief as *amicus curiae* pursuant to Rule 42 (1) of the Revised Rules of this Court urging reversal of the decision below.

Statement

By a statutory scheme typical of unemployment insurance programs throughout the country, California provides for the payment of unemployment insurance benefits to persons unemployed "through no fault of their own". Calif. Unempl. Ins. Cde. § 100; see New York Labor Law § 501.

The program contemplates a scheme of insurance to help workers over the hump of temporary unemployment. It is designed to assist people genuinely attached to the labor

market as demonstrated by their past employment and current job efforts and who, by virtue of the unavailability of suitable work, are unable to secure employment.

By virtue of its having an unemployment insurance program, California is in a position to take advantage of the enactment by Congress of a tax credit plan for states with acceptable unemployment insurance programs. There is a 3.2% tax on payrolls with credit of up to 90% of 3% for contributions made under an approved state law. The federal government then assumes the administrative costs of the state program. Under the present law, the Secretary of Labor must certify payments to the Secretary of the Treasury where the Labor Secretary has approved the state law (42 U.S.C. § 502). All monies in the state unemployment fund are deposited with the Secretary of the Treasury in the Unemployment Trust Fund (42 U.S.C. § 1104[a]).

A state plan, in order to be federally approved, must be "reasonably calculated to insure full payment of unemployment compensation when due" (42 U.S.C. § 503[a][1]) and must include, *inter alia*, the "[o]pportunity for fair hearing, before an impartial tribunal for all individuals whose claims for unemployment compensation are denied" (42 U.S.C. § 503[a][3]).

The Secretary of Labor is charged with the duty of insuring that the administration of the state law does not result in denying compensation in substantial numbers to people who are entitled to it, and must further see that the state law is administered in substantial compliance with the federal law. If the Secretary finds, after proper administrative proceedings, that benefits are being denied to people entitled to them or that there is otherwise a failure to comply with the law, he may not continue to certify the state program to the Secretary of the Treasury. 42 U.S.C. § 503(b).

Unemployment insurance benefits are paid out of a fund maintained solely by contributions paid into that fund by employers (Calif. Unempl. Ins. Code, Article 3, § 1025; see New York Labor Law, § 550). The state itself is not liable for any contributions to the fund and employees may not contribute to the fund (Calif. Unempl. Ins. Code, § 976;* see N. Y. Labor Law, § 570[6]). Employers are taxed for contributions to the fund at rates which are established by statute. Included as part of the computation is an "experience rating charge" which reflects charges to the employer's reserve account of amounts paid to persons previously employed by the same employer (Calif. Unempl. Ins. Code, Article 3, §§ 1026, 1028; see N. Y. Labor Law, § 581 [1][b][3]). Thus, the amount of benefits paid to a claimant may directly affect the amount the employer is taxed. If it is ultimately found that money has been paid which should not have been paid, that amount is not charged to the separate employer's account but to the balancing account (Calif. Unempl. Ins. Code, §§ 1027, 1032; see N. Y. Labor Law § 577[1][b][4]).

An individual employer's tax rate also depends on the amount contained in the balancing account and when that account goes beneath a certain level the tax rate also rises (Calif. Unempl. Ins. Code, § 976.5(2), see also §§ 977, 978; see N. Y. Labor Law § 577(2)).

In order to receive unemployment insurance benefits a claimant files certain forms setting forth his eligibility for benefits based on his previous work experience and the reason that he is no longer working. A copy of the form is promptly sent to the previous employer who must, within 10 days, return the form and indicate "any facts then known which may affect the claimant's eligibility for benefits" (Calif. Unempl. Ins. Cde. § 1327). If the employer's answer raises an issue as to eligibility, the claim-

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* Employees do contribute to the Disability Fund. Calif. Unempl. Ins. Code, §§ 144, 984.

ant may then be asked to submit further information relating to the reason that he is no longer working for his previous employer. An eligibility interviewer, after speaking with the claimant, and having before him the employer's answers, makes a determination as to the eligibility for benefits.

The employer is then notified of the determination and, if the determination has been that the claimant is eligible, the employer has ten days within which to file an appeal. Although payments have been commenced with the determination, they are suspended if the employer files an appeal and are not resumed until a referee has determined, after an evidentiary hearing, that the original determination was correct.

In the instant case both appellees filed claims and both employers asserted that the appellees were ineligible. In both cases the eligibility interviewers determined the issue in favor of appellees, they were held eligible for benefits and payments were commenced. In both cases the employers, unlike the vast majority of all California employers, challenged the determinations by filing appeals. Payments were then suspended. After the referee hearings, it was determined that the appellee Hudson was eligible for benefits but that the appellee, Java had never been eligible for benefits. The payments already made to Mrs. Java were not recoverable. Mrs. Hudson received retroactive payment for the period during which she was not paid but was eligible.*

Before the hearings were held, appellees sought declaratory and injunctive relief in the District Court for the

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*Overpayments are recoverable in California only if they were the result of fraud, willful misrepresentation or nondisclosure. They may not be recovered if they were received without fault and the recovery would be inequitable. Calif. Unempl. Ins. Code, § 1375. Payments received pursuant to a decision allowing them may not be recovered. Calif. Unempl. Ins. Code, § 1380.

Northern District of California claiming that they were entitled to the payment of benefits during the pendency of the employer appeals. A statutory three-judge District Court was convened and upheld their contention. The Court based its decision both on the opinion of this Court in the case of *Goldberg* v. *Kelly*, 397 U. S. 254 and on the statutory requirement of 42 U.S.C. § 503 (a)(1) that payments be made "when due". After reviewing the process undertaken to determine eligibility, the Court held that payments in California are due at the time the eligibility determination is made (A. 136-37).* It rejected defendants' argument that payments were not due for the further ten-day period during which an employer can appeal pointing out that the Department in fact began payments immediately (A. 137).

The Court then went on to hold that, since "when due" meant due at the point when all the parties had been heard, evidence collected and an adjudication made, "California's provision allowing benefits to be stopped without any pre-termination procedures raises serious due process questions and the continued arrest of payments for a median of seven weeks similarly causes doubt as to whether California's program is 'reasonably calculated to insure full payment of unemployment compensation when due.' 42 U.S.C. § 503 (a)(1)" (A. 137).

The Court found this case to be "indistinguishable" from *Goldberg* v. *Kelly, supra* (A. 138). It rejected any argument that the unemployment insurance claimant is any less needy than the welfare recipient and, in an observation typical of the Court's confusing of the statutory and constitutional grounds for its decision, stated that "the defendants' efforts to distinguish this case from the constitutional reasoning of *Kelly* and *Sniadach* [v. Family Finance Corp., 395 U. S. 337] only serve to point up the

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* Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix before this Court.

validity of the statutory grounds argued by plaintiffs" (A. 138). Pointing out that one of the purposes of unemployment insurance is to keep people off welfare, the Court reasoned that since some 5,000 eligible recipients each year in California for a median period of seven weeks and since the average period of unemployment in California is about nine weeks, it is clear that as to these people payments are not made when due (A. 139). The Court concluded:

> "Accordingly, this Court finds Calif. Unempl. Ins. Cde. § 1335 defective on both constitutional and statutory grounds. By not providing for a pre-termination hearing, it runs counter to the principles enunciated in Goldberg v. Kelly Cit., supra and by being applied so as to result in a median seven week delay in payments to claimants who have been found eligible for such payments, the California statute violates the directive of 42 U.S.C. 503 (a) (1)." (A. 139)

POINT I

The state policy suspending payment of unemployment insurance benefits pending resolution of an employer appeal from a decision allowing benefits does not conflict with the federal statutory requirement that payments be made "when due".

In holding California Unemployment Insurance Code § 1335 to be in conflict with 42 U.S.C. § 503(a)(1) the court below relied on two factors. It held first, that payments are "due", and paid, in California when an eligibility interviewer determines that a claimant is eligible for benefits. It found second, that the median seven-week delay in California in disposing of employer appeals means that the state statute is not reasonably calculated to provide for the payment of benefits when they are due. Neither ground supports the decision below. The first takes account only

of one aspect of the entire state unemployment insurance scheme; the second is not a statutory conflict at all, but is, rather, an administrative concern.

Initially, although it was proper for the District Court to hold that California law controls when payments are due in that State, the Court ignored the only applicable provision of that law. While payments are due in California when an eligibility interviewer determines that they are due, another section of the same statute (Calif. Unempl. Ins. Code § 1335) specifically declares that payments are not due when an employer files an appeal. If California law governs the one situation, it also governs the other and, if the applicable statute specifically says that money is not payable, it is incorrect to determine that the statute says that it is payable. The real question is whether the statute which says that payments are not due when an employer files an appeal conflicts with any congressional mandate as to the time when payments must be made. Clearly, there is no specific Congressional directive dealing with the time when payments are due. Moreover, there is substantial evidence indicating that Congress was well aware of the possibility, and did contemplate, a suspension of payments pending resolution of an employer-initiated hearing.

In the first place, the so-called double affirmance clause has been standard in state unemployment insurance statutes since the inception of the unemployment insurance program.* As appellants' brief points out, it was part of a proposed statute circulated through Congress before the federal statute was adopted. Indeed, Congress itself, in

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* A double affirmance clause provides that contested payments shall be made after a hearing officer's affirmance of the agency determination and an appeal board's affirmance of the hearing officer. California has a modified version of this clause in that payments are resumed after the hearing officer's affirmance of eligibility without regard to any further appeal.

enacting the Unemployment Insurance Law for the District of Columbia included a true double affirmance clause. D. C. Code § 46-311(b). Congress, thus, cannot be said to have been unaware of such clauses or to have enacted two inconsistent statutes.

Second, Congress has never enacted, in the years since unemployment insurance was first established, any statute eliminating the double affirmance clause, although § 503 has been amended several times. See *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers,* 398 U. S. 281, 287.

Third, the Secretary of Labor is required to certify state plans to the Secretary of the Treasury before any payments may be made to states for their programs. 42 U.S.C. § 502. The Secretary has consistently certified state plans containing the double affirmance clause. This interpretation is entitled to great weight. *Zemel* v. *Rusk,* 381 U. S. 85; *Udall* v. *Tallman,* 380 U. S. 1.

Finally, the Court below relied exclusively on 42 U.S.C. § 503(a)(1), the "when due" clause, overlooking the hearing clause itself (42 U.S.C. § 503[a] [3]). That section requires a state to provide for hearings for people whose claims "are denied." The section does not preclude denying benefits, pending review, to persons whose claims are contested during that contest. It clearly does contemplate allowing the State to deny benefits first and then hold the hearing.

The sound policy behind the double affirmance clause fully sustains its conformity with the Congressional mandate that payments be made when due. Unlike any other administrative scheme, unemployment insurance deals directly with the rights not only of the claimant before it and the interest of the public at large, but also with the rights of the claimant's former employer. Funds for the payment of benefits are obtained solely from a tax

on employers. The individual tax rate is based on an "experience rating charge" and depends to a large extent on the amount previously paid to former employees of the same employer. Although payments which were improperly made are not charged to an individual employer's account, they are charged to a so-called balancing account. When that account goes below a certain level, an additional tax is imposed on all employers.

Apart from any constitutional right to standing or to a hearing which this scheme gives to the employer (see Point II, *infra*), it is clear that it was well within the legislative competence to balance the interests involved. The rationale behind this legislative resolution of the problem is well stated in *Abelleira* v. *District Court of Appeals*, 109 P. 2d 942, 952 (Calif. 1941):

> "The legislature recognizing the importance on the one hand of avoiding improvident payments without due consideration of the right thereto, and the danger on the other hand of withholding the payments for long periods through the slow processes of appeal to the Commission and perhaps eventually to the courts, took the middle course. This appeal, ordinarily decided in a short period of time, carries with it a stay. But when the second decision has also been made in favor of the applicants, the benefits begin, with protection, as already noted, for the employer in the event of later reversal. . . ."

In striking this balance, the Legislature must have assumed good faith on the part of all parties, the claimant in making his application, the employer in opposing the payment of benefits, and the agency in reaching its determination. This presumption of good faith is borne out by the fact that most claimants are ruled eligible for payments and that most employers do not protest the payment of benefits. Under these circumstances, it was wholly reasonable for the legislature to provide for some

administrative stay pending review of a contested claim to prevent the improvident expenditure of funds and then determine that most subsequent appeals would probably be unsuccessful and that the principal of prompt payment after the first review would not result in great unwarranted expense and would, by and large, accord swift payment to eligible claimants. Certainly, there is no indication by Congress that it disagrees with those findings.

The present statutory scheme thus provides for the prompt payment of benefits to almost all claimants as soon as they are ruled eligible. There are at least three possible ways in which affirmance of the decision below would undermine the efficacy of that scheme. First, there would be a natural tendency not to resolve issues of eligibility in favor of the claimant in the first instance, as the interviewers did in the cases involving appellees, although such results are unappealed in most cases even when there has been an initial protest. The tendency would be to leave the decision to the referee after a hearing. The second possible undesirable result is that it would be necessary to have evidentiary hearings at which the employer's presence is required before the determination of eligibility can be made. This procedure would necessarily delay all claims and would be in direct conflict with the Congressional and State policy mandating prompt payment where possible. The third result would be that, in those cases in which employers are successful, unrecoverable sums of money will have been paid to the detriment of the program. The present system provides greater incentive for employers to exercise a kind of supervisory interest over the proper running of the insurance program by their ability to appeal findings of eligibility. Yet there is no evidence that they presently abuse this power and, if payments are to be made despite an employer appeal, at least some of the incentive to provide this check would be removed.

The other basic ground for the District Court's holding is that the delay between the time a hearing is requested

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by an employer and the time that the hearing is actually held establishes a conflict between the state and federal statutes. However, the State statute does not refer to time at all. If any delay at all is authorized by the statute (or by the Constitution) then the question of the length of that delay is for administrative solution. There are ample federal administrative procedures for supervising this kind of problem and the problem should in the first instance be dealt with at that level. See 42 U.S.C. § 503(b).* Alternatively, the problem is a legislative one. The Legislature can investigate and determine that its statute is not working as it was contemplated that it would work. It is then for the Legislature to revise the statute, perhaps by setting a maximum time limit for any stay. See e.g., N. Y. Civil Service Law, § 75(3). But it is wholly unreasonable to say that a statute which is silent as to time contemplates a fixed period within which certain action must be taken or that the statute is then out of conformity with the federal law which also does not provide a definite time limit.

POINT II

The suspension of payment of unemployment insurance benefits pending resolution of an employer appeal does not violate the claimant's right to due process of law.

Notwithstanding the fact that it had disposed of the case on statutory grounds, the court below proceeded also to decide that the statute in question violates the appellees' right to due process of law. However, if a statutory disposition can be made of a claim, the constitutional ground should not be reached and should not have been reached by the Court in this case. *King* v. *Smith*, 392 U. S. 309.

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* As we have suggested, *supra*, the "solution" reached by the Court below could be to delay all cases instead of only the relative handful now delayed.

The Court based its constitutional holding on the failure of the California statute to provide for an evidentiary hearing prior to the suspension of benefits, finding the case before it to be "indistinguishable" from the decision of this Court in *Goldberg* v. *Kelly*, 397 U. S. 254. The Court viewed unemployment insurance claimants as being fully as needy as welfare recipients and found, as it had in deciding the statutory claim, that the time lapse between the employer's filing of an appeal and the actual hearing was a denial of due process to claimants of unemployment insurance.

The Court's reliance on *Goldberg* v. *Kelly*, *supra*, is misplaced for a number of reasons. To the extent that it appears to believe that that case heralds an era when no government benefit may be denied before a hearing is held, it overlooks the language of this Court to the contrary in *Goldberg* itself (397 U. S. at 263) and in other cases. See, e.g., *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886; *Bowles* v. *Willingham*, 321 U. S. 503, 520; *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 595-97; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U. S. 594. See also *Jaeger* v. *Freeman*, 410 F. 2d 528, 531 (5th Cir. 1969); *Medoff* v. *Freeman*, 362 F. 2d 472 (1st Cir. 1966); *Gonzalez* v. *Freeman*, 334 F. 2d 570 (D. C. Cir. 1964); *R. A. Holman & Co.* v. *SEC*, 299 F. 2d 127 (D. C. Cir. 1962), *cert. denied* 370 U. S. 911. See also *DeLong* v. *Hampton*, 422 F. 2d 21 (3rd Cir. 1970); *Madera* v. *Board of Education*, 386 F. 2d 778 (2d Cir. 1968), *cert. denied* 390 U. S. 1028; *Boone* v. *Wyman*, 295 F. Supp. 1143 (S.D.N.Y. 1968), *aff'd* 412 F. 2d 857 (2d Cir. 1969), *cert. denied* 396 U. S. 1024.

As we suggested in Point I, *supra*, if a right to benefits is to vest after any payment is made, then the employer must be accorded the right to a hearing before there can be a determination allowing benefits because of the source of the funds for unemployment insurance. The employer,

no less than the claimant, has a right to due process of law. See *District Unemployment Compensation Board* v. *Wm. Hahn & Co., Inc.*, 399 F. 2d 987 (D. C. Cir. 1968).

Due process in this context certainly means unassailable standing to challenge the result. *Bodinson Mfg. Co.* v. *California Employment Commission*, 109 P. 2d 935 (Cal. 1941). But the ability to challenge must be a meaningful one; that is, it must be available at a time when the action sought to be prevented can still be prevented. Otherwise, the employer has not had the kind of review to which he is entitled.

Indeed, there are state courts which have held the double affirmance clause be a denial of due process to the employer because it provides for payment to claimants even while the employer is seeking judicial review of the allowance of benefits. *Pennsylvania State Chamber of Commerce* v. *Torquato*, 386 Pa. 306, 125 A. 2d 755 (1956), *cert. denied* 352 U. S. 1024; *Chrysler Corporation* v. *Smith*, 297 Mich. 438, 298 N. W. 87 (1941); *Dallas Fuel Co.* v. *Horne*, 230 Iowa 1148, 300 N. W. 303 (1941); *State ex rel. Campbell* v. *State*, 57 N. E. 2d 433 (Ind. 1944). The rationale of each of those cases is that to deny the judiciary the right to grant a stay would be to make the administrative process superior to the judicial process and "the controverted issue of claimant's right to be paid compensation would in effect be finally decided and the compensation paid without affording the adverse party any opportunity whatever to obtain a stay of the rights of the respective parties". *Chrysler Corporation* v. *Appeal Board of Michigan Unemployment Compensation Commission*, 301 Mich. 351, 3 N. W. 2d 302 (1942).

On the other hand those courts, including California's, which have upheld the constitutionality of the double affirmance clause against employer challenge (*Abelleira* v. *District Court of Appeal*, 109 P. 2d 942 [Calif. 1941]; *State ex rel. Aikens* v. *Davis*, 45 S. E. 2d 486 [W. Va. 1947];

Abraham v. *VanMeter*, 303 P. 2d 434 [Okla. 1956], *app. dism.* 353 U. S. 944; *Aero Design and Engineering Co.* v. *Oklahoma Employment Security Commission*, 151 F. Supp. 844 [W. D. Okla. 1956], *aff'd* 353 U. S. 943), have done so on the balancing process described above (*supra*, pp. 10-12), which includes the fact that the employer has already had at least one plenary review complying with all of the strictures of due process before payments against his account are resumed. The Court below has removed that one review and has created a situation where, to provide that review, a plenary hearing will have to be afforded in all cases before benefits are allowed. The decision implies that because the employer's position is solicited before the eligibility determination was made, he has adequate opportunity to be heard. This solicitation, which is not even a personal interview, is certainly not the kind of hearing the Court contemplates for claimants who are denied benefits. Certainly, people who will be charged in some way with the payments which are made should also have the opportunity to be heard.

Nor is the third party interest the only distinction between unemployment compensation and welfare. The Court below placed primary reliance on the asserted need of unemployment insurance recipients as equal to the need of welfare recipients. This, however, is not the basis of unemployment insurance. Need, in the *Goldberg* sense, is not a defining characteristic of the class which appellees claim to represent. Whereas, "by hypothesis" (397 U. S. at 261), need is the basis of welfare, it is not relevant to a determination of eligibility for unemployment insurance benefits. Congress specifically mandated this distinction when it rejected any means test of eligibility for unemployment insurance.

The irrelevance of need to eligibility is further evidenced by the fact that the amount of weekly benefits depends strictly on the wages received during the period of em-

ployment and varies directly with the amount of those wages. The higher the previous earnings, the higher the benefits. If there were no previous earnings or they were less than a certain amount, the claimant is not eligible. No account is taken either of the claimant's resources or of his obligations.

Moreover, unemployment insurance is paid for a limited period of time regardless of the further needs of the claimant. It is simply a temporary measure designed, during the hiatus between jobs, to allow the claimant to maintain his standard of living as well as possible. Thus, it is not the general purpose of unemployment to guard against "brutal need." *Goldberg* v. *Kelly, supra,* at 261.

Accordingly, while the unique nature of welfare made it a matter of due process to allow no interruption of payments to possibly eligible recipients, no such due process right attaches in unemployment insurance. That is governed by the general rule that the Legislature can adopt the means most reasonably calculated to protect the rights of all parties. Moreover, if any delay is constitutionally permissible between the allowance of benefits and their payment then the length of the delay which actually exists in a given state is no more a matter of due process than it is of statutory interpretation. The question is, as we have said, one for regulation by federal or state administrative agencies or by state courts (*supra,* p. 12).

The inappropriateness of the constitutional holding below is vividly illustrated by the wholly unwarranted ramifications of that holding, ramifications which are not speculative but which already have borne fruit in at least one subsequent decision and several pending lawsuits. Thus, a single District Judge in California has held, based on the decision below and on *Goldberg* v. *Kelly, supra,* that a recipient of unemployment insurance who was determined by the agency itself to have "precluded an offer of suitable work" and who was then declared ineligible for benefits for

ten weeks is also entitled to a full hearing before payments can be stopped. *Crow* v. *California Department of Human Resources,* Case No. C-70 1128 ACW (N. D. Calif, Oct. 12, 1970). This position is basically inconsistent with the instant case which relies on the ability of the agency to make a valid determination of eligibility to vest the right to payments in the first place. No explanation is given of why an agency which can declare someone eligible for benefits cannot also make a finding of ineligibility. Certainly the nature of the investigation conducted to make the finding of ineligibility is no less thorough than the investigation to determine eligibility.

In New York, a suit has been filed claiming that the agency which once determined a person eligible for benefits cannot, without a prior hearing, redetermine that that person was never eligible for benefits and further claiming that a person who has been found eligible for benefits may not, without a hearing be found ineligible for any subsequent benefits during a period when he is determined to be unavailable for employment. *Torres and Dinger* v. *New York State Department of Labor,* 70 Civ. 2408 (S.D.N.Y.). In *Torres,* too, the plaintiffs rely on *Goldberg* v. *Kelly, supra,* and on the decision below. A three judge court has been convened, largely on the strength of those cases, and the case is presently *sub judice.*

Thus, *Goldberg* v. *Kelly, supra,* and the decision below are being used as the basis for seeking restructuring of the entire unemployment insurance scheme. The logical outcome of these progeny will not only require hearings before payments can be stayed pending an employer appeal, as in the decision below, but will require hearings before the agency itself can make a determination based on its own findings whether the question involved is one of initial eligibility or of the week-by-week eligibility of each claimant which is an integral part of the unemployment insurance structure. For, again unlike welfare, un-

employment insurance is paid on a weekly basis for the past week and there is no presumption of continuing eligibility. Indeed, eligibility is maintained only on a showing that the claimant has made every reasonable effort to find work in the past week and has been unable to do so. Calif. Unempl. Ins. Cde. § 100. The disruption in the orderly process of evaluating each claimant weekly would be enormous and the amount of money which would have to be paid in these circumstances would likewise be enormous.

CONCLUSION

For the foregoing reasons the decision below should be reversed.

Dated: New York, New York, December 9, 1970.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
of Counsel

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